



Maplebear, Inc., d/b/a Instacart  
50 Beale Street  
Suite 600  
San Francisco, CA 94105

September 12, 2019

Richard Cram  
Multistate Tax Commission  
444 North Capitol Street NW, Ste 425  
Washington DC 20001

**RE: Wayfair Implementation & Marketplace Facilitator Working Group  
Comments on Prioritized Issue List**

Dear Mr. Cram,

Maplebear Inc. DBA Instacart (hereinafter “Instacart” or the “Company”) would like to thank the Multistate Tax Commission (“MTC”) for reopening its Wayfair Implementation & Marketplace Facilitator Working Group (the “Working Group”). We believe creating a requirement for marketplace facilitators to remit the tax is a significant change to the sales & use tax law and believe such a monumental change deserves a robust stakeholder process to ensure a smooth implementation. Under Instacart’s model, both Instacart and the Marketplace Seller have physical presence nexus. As a result, our comments will focus on Marketplace Facilitator related issues rather than economic nexus.

The Company believes the current approach taken in the model statute, and oft adopted by the states, oversimplifies the Marketplace Facilitator industry. By contemplating only marketplace platforms that allow both non-registered and registered Marketplace Sellers to sell tangible personal property or taxable services throughout the U.S. market, the model legislation failed to address industry specific considerations that apply to only a sub-set of marketplaces. Instacart falls squarely into one of those sub-sets – namely food delivery marketplaces where the food, whether groceries for home consumption or prepared food, is ordered online and picked and/or packed at brick-and-mortar retail location. Due to inventory, loss prevention, and cash management reasons, an in-store, administrative transaction is completed at the store’s point of sale system even though the true tax sale occurs on the online marketplace – Instacart.com or the Instacart Application (“App”). Guidance on how to document that in-store, administrative transaction as tax-free has not yet been fully contemplated by any state making compliance extremely difficult. In addition, it is often limitations to the systems used by these brick-and-mortar Marketplace Sellers that make remittance from the Marketplace Providers challenging.

## **Comments on MTC Prioritized List of Issues**

### ***Issue #5 (Also Relates to Issue #1): Collection Responsibility Determination***

This issue is the highest priority for Instacart. Simply put, Instacart would like the flexibility to allow our Marketplace Sellers to elect whether they want Instacart to remit tax on the transaction or continue remitting themselves. The two policy reasons that states have provided for requiring the Marketplace to be the remitting party simply do not exist under Instacart's Marketplace model:

1. without legislation, sales and use tax was not being collected and remitted for transactions occurring through marketplace facilitation websites; and,
2. it is more efficient for the state to process one tax return and audit the Marketplace Facilitator rather than many Marketplace Sellers.

While flexibility in defining who is the remitting party is the core issue, there are a number of palatable solutions to resolve our concerns, many of which were addressed in response to the survey and are discussed below.

*Should the marketplace facilitator/provider and the marketplace seller, under certain circumstances (such as when the marketplace seller has already been collecting the tax, etc.), be able to contractually agree which party has the sales/use tax collection obligation*

Instacart believes the Marketplace Facilitator and the Marketplace Seller, who by definition are registered brick-and-mortar grocery stores, should be able to contractually agree which party has the sales and use tax obligation. In fact, our bilateral agreements entered into with each Marketplace Seller explicitly confirm that the burden of remitting tax remains with the Marketplace Seller. How such flexibility is defined is less important, and the solutions listed by the states and the Retail Industry Leaders Association ("RILA") in the August 30, 2019 memo are all palatable with exceptions noted below.

Whether the statute allows Instacart to collect certain information (i.e. the Marketplace Seller's Permit) to support that the Marketplace Seller is registered similar to Maine, Minnesota, and Nevada or has a general clause indicating "nothing in this section shall be construed to interfere with the ability of the marketplace facilitator and marketplace seller into agreements with each other regarding fulfillment of the requirements", both provide the flexibility that allow Instacart's Marketplace Seller to retain remittance control at their election.

Specifically, Instacart is supportive of RILA's model with one exception. Any requirement that the Marketplace Seller have a significant sales threshold before agreement can be made appears arbitrary. The real concern should be whether the Marketplace Seller is registered and capable of remitting. Thus, we would advocate for the position that a bilateral agreement between a Registered Marketplace Facilitator and Registered Marketplace Seller should be sufficient to shift the burden in all cases, and if a threshold is included, it should be commensurate with the economic nexus threshold adopted by the state in response to *Wayfair*.

In addition, we would encourage any state that allows the parties to agree on who will fulfill the tax remittance requirements to develop standard language and procedures for the non-remitting party to document the arrangement to avoid contentious audits in the future. Of upmost concern are documentation requirements that require one taxpayer to produce the confidential records of another taxpayer to support its position on audit. See Certification Requirements discussion below for further information.

*Should the state tax agency have the authority to waive the marketplace facilitator/provider collection requirement in certain limited circumstances? Would such an authorization raise any "unlawful delegation" concerns?*

The waiver is a second alternative that is palatable to Instacart. In fact, the recommendation of allowing a "waiver" was partially developed by Instacart in conjunction with other companies in the technology industry to address the very issue before the MTC. As such, we are generally supportive of such waiver language, but we would encourage the implementation of the waiver that allows flexibility for the Marketplace to remit on behalf of certain Marketplace Sellers.

While we are generally supportive of a waiver, like with many things in sales & use tax, the devil is in the details. We have concerns when the statutory language or interpretation of the statute limits what type of Marketplace Providers may request the waiver.

For Instacart, there are two principles that should apply to any waiver process: 1) the ability to apply for such a waiver should be based on the Marketplace Sellers already being registered and auditable by the state rather than trying to define certain industries that can request a waiver, and 2) there should be a mechanism for the Marketplace Facilitator to remit tax on some, but not all, of the Marketplace Sellers.

Examples of language or interpretations of the waiver that would be problematic for Instacart are as follows:

- If the waiver is "all or nothing", meaning Instacart needs to remit tax on 100% of sales through the platform or the Marketplace Sellers need to remit tax on 100% of the sales, the waiver option becomes unworkable. This lack of flexibility may lead to absurd results. For example, if all small Marketplace Sellers want Instacart to remit but one large national chain wants to continue remitting, the large national chain will effectively be making the decision for all local merchants. Alternatively, if most of our Marketplace Sellers want to continue remitting themselves, but one small local chain with unsophisticated systems wants Instacart to remit, the small local chain will be making the decision for large, sophisticated Marketplace Sellers. In either case, the operation of such a strict waiver allows a Marketplace Seller's competitor to make a business decision that binds that Marketplace Seller when the two companies have diverging interests.
- Maryland's waiver has three prongs, the first of which is "the Marketplace Seller is a communications company that is publicly traded or is controlled directly or indirectly by a company that is publicly traded." This waiver, therefore, only applies to the communications industry and does not address the concerns raised by Instacart and the other Delivery Network Companies ("DNCs") that deal in food delivery.

- Ohio's waiver can be applied for only by the Marketplace Seller. This seems both inefficient and insufficient as the Marketplace Facilitator is the company with the obligation under the statute. We believe it is more efficient for the state to allow the Marketplace Facilitator to also request a waiver.
- Wisconsin's waiver lists three types of companies that can apply for a waiver: a hotel, a motel, or a restaurant. Again, by limiting the list of Marketplace Facilitators that can request a waiver, the statute does not contemplate all of the Marketplace Facilitators that may have similar issues.

Instacart is supportive of RILA's model but would encourage any state that allows for such waiver to allow for flexibility so that the Marketplace Facilitator can remit tax on behalf of some, but not all, of the Marketplace Sellers selling goods on the marketplace platform. We believe the proper implementation of a waiver program would issue a "Waiver Permit" or something similar that can be used by the non-remitting party to document that the remitting party has agreed to be responsible. For more discussion of the "Waiver Permit" see Certification Requirements.

*When the sales transaction involves other applicable taxes, besides sales/use tax, which party (marketplace facilitator/provider or marketplace seller) should be responsible to collect?*

The taxes or fees at issue for Instacart include bottle fees, litter or environmental fees, and sugary-sweetened beverage fees.

Instacart is supportive of RILA's Model but would encourage an express list from the state of what taxes/fees are included versus excluded rather than a general clause. Moreover, a larger concern is clarity on whether the local governments can require the marketplace to collect local taxes or fees. For administrative feasibility, we prefer the local governments be unable to require the Marketplace to remit unless those taxes/fees can be reported on the state return.

#### *Definition of a Marketplace Facilitator (Issue #1)*

While not wholly related to Issue #5, we believe there is an alternative related to Issue #1 that could also resolve our concerns. Statutorily excluding a marketplace facilitator that facilitates "food delivery" or is a "delivery network company" from the definition of a marketplace facilitator would also provide the necessary flexibility. For example, California excluded DNCs from its definition of Marketplace Facilitator. A DNC is defined as "a business entity that maintains an internet website or mobile application used to facilitate delivery services for the sale of local products."<sup>1</sup>

The effect of excluding food delivery or DNCs from the definition similarly allows Instacart to continue passing the tax to the Marketplace Sellers for remittance. However, we once again believe having flexibility to remit for the Marketplace Sellers or allowing them to continue remitting is crucial to a successful resolution.

---

<sup>1</sup> Cal. AB 147 (2019).

### ***Issue #8: Certification Requirement***

Instacart encourages the states to provide clear guidance for how the non-remitting party will document that its failure to remit tax was proper and in turn avoid unnecessary issues on audit. This issue is of particular importance for transactions where there is an in-store, administrative transaction that will run through the Marketplace Seller's system just like non-marketplace transactions.

The preferred approach is for the states to provide guidance on what notice or agreement language will be accepted by the state. In the alternative, certification can also be handled similar to an entity or transition-based exemption. Similar to exemptions, the Marketplace Facilitator legislation allows one party, generally the Marketplace Seller, to avoid remitting sales tax on sales that would otherwise be subject to tax. Moreover, we encourage the state to be accurate in developing its certification requirements and consider the tax "excluded" rather than "exempt".

Finally, if a state chooses the waiver route, we encourage that the implementation of the waiver process includes a "Waiver Permit" that is issued by the state to the Marketplace Facilitator. If the Marketplace Facilitator is willing to remit tax for some Marketplace Sellers but allows others to continue remitting, we believe such a waiver can clarify the agreement between the parties. Attached is an example "Waiver Permit" to demonstrate what we believe would be a reasonable format.

The above solutions will ensure that both the Marketplace Facilitator and the Marketplace Seller will be clear on who has the obligation to remit. In addition, the state will be able to audit the certification language or certificate and apply a similar process for testing exemption certificates. This will ensure that the confidential records of one taxpayer will not be required to support another taxpayer's audit. Finally, any variances in a statutes of limitation or document retention periods for the two parties will become moot under a certification regime.

### ***Conclusion***

In summary, we believe there are three critical considerations to address Marketplace Facilitators, like Instacart, where the Marketplace Sellers are registered brick-and-mortar stores who have agreed to remit tax. First, there should be a mechanism for the Marketplace Facilitator to shift the tax remittance burden back to a registered Marketplace Seller. This mechanism can be in the form of a clause allowing for the registered Marketplace Facilitator and Marketplace Seller to enter into a bilateral agreement determining who will remit the tax, through a waiver application with the state, or by definitionally excluding certain Marketplace Facilitators from the statutory definition. The key for Instacart is the mechanism should allow for flexibility so that the Marketplace Facilitator can remit on the sales of some Marketplace Sellers but allow others to continue remitting themselves. Finally, we believe a well-defined certification process, whether with defined language or an actual certificate, is crucial to ensuring compliance.

Instacart would like to partner with the states to resolve these issues as the laws are being implemented rather than waiting for protracted audits due to lack of clarity. We are happy to answer any questions the MTC or its member states may have. Thank you again for your

attention to these important policy questions as we adjust to Marketplace Facilitation legislation and requirements.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephanie", followed by a stylized flourish or scribble.

Stephanie Gilfeather  
Head of Tax – Instacart  
[stephanie.gilfeather@instacart.com](mailto:stephanie.gilfeather@instacart.com)  
(206) 491-7423

Attachments

# Marketplace Facilitation Waiver Permit

This permit allows the Marketplace Facilitator to shift the burden of remitting sales & use tax to a registered marketplace seller.

## Marketplace Facilitator Information:

ABC Marketplace Facilitator, INC  
1234 Main Street  
City, State ZIP  
Registration No.: xxxxxxxxxxxxxx

Permit Number: xxxxxxxxxxxx  
Effective Date: xx/xx/xxxx  
Expiration Date: xx/xx/xxxx

### ☐ Option 1: Marketplace Facilitator is the Remitting Party

Marketplace Facilitator and Marketplace Seller listed below have agreed that Marketplace Facilitator will remit sales & use tax to the State of/Commonwealth of XXX. A copy of this permit documents that the Marketplace Seller is not required to remit sales & use tax on any transactions facilitated through the marketplace platform. If the marketplace transaction is documented in the Marketplace Seller's Point of Sale or billing system(s), this permit shall document the tax-free treatment of that administrative transaction.

### ☐ Option 2: Marketplace Seller Remitting Party

Marketplace Facilitator and Marketplace Seller listed below have agreed that Marketplace Seller will remit sales & use tax to the State of/Commonwealth of XXX. A copy of this permit documents that Marketplace Facilitator is not required to remit sales & use tax on any transactions facilitated through the marketplace platform because the Marketplace Seller has agreed to remit tax to the state. If the marketplace transaction is documented in the Marketplace Seller's Point of Sale or billing system(s), this permit shall document the tax-free treatment of that administrative transaction because the marketplace transactions will be reported based on the Marketplace Report issued to the Seller.

## Marketplace Seller's information

Business Name: \_\_\_\_\_ Account ID: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone Number: \_\_\_\_\_ Email Address: \_\_\_\_\_

The undersigned parties, as Marketplace Facilitator and Marketplace Seller, certify the election made above. The non-remitting party may keep a copy of this permit in its records in order to document this agreement in case of an audit.

\_\_\_\_\_  
*Printed Name – Marketplace Seller Authorized Signer*

\_\_\_\_\_  
*Printed Name – Marketplace Facilitator Authorized Signer*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Date*

\_\_\_\_\_  
*Signature*

\_\_\_\_\_  
*Date*